No. 16719

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SEARS, ROEBUCK & COMPANY, a corporation, *Appellant,* *vs.* SIDNEY SCHULEIN, Trustee in Bankruptcy of the Estate of Charles Robert Baldwin and Betty June Baldwin, bankrupts, *Appellee.*	No. 16719

Appellant's Reply Brief

On Appeal from the United States District Court for the Eastern District of Washington Northern Division

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C. W. HILL PRINTING CO.

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CASES CITED

ARGUMENT

In the interest of clarifying the arguments presented on behalf of both parties, Appellant respectfully submits the following comments in reply to the brief of Appellee.

The Appellee's brief is built on mis-emphasis of principles and unwarranted inferences drawn therefrom. These will be briefly referred to in the sequence of their appearance:

1. On page 1 of Appellee's brief the statement in the last paragraph under D, covering the situation if *no* bankruptcy has been filed, is misleading. Contrary to the Appellee's statement, title to the personal property would not have remained in Appellant, but, as to all subsequent creditors, would be in the Baldwins; and the Baldwins would have an exemption available to them and could claim such exemption against everybody except Sears. The filing of bankruptcy works no change, and the Baldwins have title and can claim an exemption as against the trustee, and retain title to the property as against the trustee.

2. The argument under E. 1 on page 2 of Appellee's brief ignores the established and recognized authority of *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup. Ct. 751, 47 L.Ed. 1061, cited in Appellant's opening brief; wherein it was pointed out that in bankruptcy the presence of an interest such as Sears has in this case, does not prevent a claim of exemption by bankrupts in the property. Contrary to Appellee's statement, the trustee here is seeking exempt property, but the property is exempt insofar as

the trustee is concerned, and the trustee cannot succeed to title to such exempt property.

3. Under argument No. E. 2 on page 2 of Appellee's brief, if title to the property was actually reserved in Sears, as Appellee states, then the trustee would have no rights in it whatsoever. The Washington conditional sales statutes place title in the Baldwins, and the trustee may succeed to such property, unless it is claimed as exempt, in which case the title remains in the Baldwins, it does not remain in Sears so far as the trustee is concerned.

4. The Appellee cites Section 6 of the Bankruptcy Act on page 3 of its brief, but there is in this case no attempted avoidance "under this Act." The trustee is only attempting to acquire a right under a state statute. This he cannot do. See *Rosof v. Roth*, 169 Fed. Supp. 707 at page 712. The Appellee's argument begs the question of whether the transaction is voidable. There is nothing being avoided, the trustee is merely attempting to preserve a lien which he claims is voidable. This is not such a situation as Section 6 refers to or contemplates.

5. *In re Phillips,* cited on page 3 of Appellee's brief, is authority for the Washington state statute, which provides that a debtor cannot claim exemption against an execution on an obligation representing a part of the purchase price, but this, of course, does not prevent the Baldwins from claiming an exemption against every other situation, including the trustee in bankruptcy. There then seems to be no particular reason to cite this case.

6. Appellee has included in page 3 what appears to be a quotation from *Sears Roebuck and Company v. McAllister*, 184 F. (2d) 487, with which short opinion this court must be thoroughly familiar. We have been unable to find the cited quotation in the published opinion, and submit that the McAllister case is not authority for the statement quoted, which must have been credited to it inadvertently by Appellee. Similarly *Lockwood v. Exchange Bank* does not support the statement either, despite the reference to it in the same citation.

7. Appellee next states under his argument No. 2 on page 4 that the Washington exemption laws are not self-executing, with what inference or purpose Appellant does not understand. In this case the Baldwins *did* claim the property as exempt. They can do no more. The Washington statutes, as quoted in the opening brief, allow setting aside a valuation of $750.00 and the trustee's duty is to set aside claimed property up to that valuation.

8. Appellant submits that the *Hemsell v. Rabb* and *In re Porter* cases cited on page 4 of Appellee's brief do not set out any rule contrary to the *Lockwood v. Exchange Bank* decision, and do not alter the principle set out therein. Each of the two cited cases was based on a homestead exemption made subordinate by state law to pre-existing liens declared voidable under Section 67 of the Bankruptcy Act. We do not have that situation in this case.

9. Appellee's argument No. E. 3 on page 4 makes no attempt to answer Appellant's opening argument, but only mis-emphasizes it to come within the Appellee's conclusion

that bankrupt's exemptions are not affected by a transfer to the trustee. The trustee clearly is attempting to ignore the bankrupt's exemptions and divert them to his own purpose.

10. Appellee's argument No. E. 4 on page 4 is obviously inconsistent. The court order appealed from requires the Baldwins to pay the balance of the purchase price to the trustee. Appellee states the trustee "will not" compel the payment, but then states that the trustee "will insist" that this be done. Appellant submits that even under the theory of preserving a lien by the trustee, there is no authority for transferring a contract right of "resorting to repossession" to him.

11. Under Appellee's "Additional Argument in Support of Judgment" F on page 5, it need only be pointed out again that the Baldwins did claim their exemptions. They made no claim for an "equity" only. They claimed the entire property. It was the trustee who attempted to set aside an "equity" and from the referee's decision approving that result, the appeal was taken.

12. The Appellee's brief is brought to a close by reliance on the case of *In re Mattingly*, cited on page 5, and a citation thereform. This case is distinguishable on the facts in that certain creditors there sought to have the bankrupt forced to claim an exemption. Here the Baldwins claimed their exemption. Sears abides by and relies on that action of the bankrupts. Further, the quoted portion of the Mattingly case is dictum only. That case was in a District Court in the Sixth Circuit. We are here in the Ninth Circuit where the case of *Baumbaugh v. Los Angeles Morris Plan Co.*, 30 F.

(2d) 816, cited in Appellant's opening brief, has been decided, and we assume is still the law. This court in that case said the bankrupt could not waive exemptions, which had once been claimed, to the detriment of a creditor having a special lien claim against it. Under the present state of the decisions, Appellant submits that the *Morris Plan* case is controlling, not the *Mattingly* dictum.

Reaffirmation of Appellant's Principles.

When the chaff is all blown away, the essential kernels must be apparent. The Baldwins claimed the refrigerator and sewing machine as exempt. The value of these items, together with the value of all the property claimed exempt by the Baldwins, was within the state valuation limits, and must be set aside to the Baldwins without any title or portion thereof going to the trustee.

The trustee, Appellee, under the wording of Section 70(e)(2) of the Bankruptcy Act, is attempting to apply the wording of the 1952 Amendment to a situation it was not intended to meet.

The trustee is not in a position to step into the shoes of Sears in this case. There is no basis in the Bankruptcy Act under which he can claim to do so. There are no rights he can claim in exempt property.

In a similar case in the Western District of Washington, Northern Division, United States District Judge, The Hon. William J. Lindberg, passed on this exact point in the attempted application of Section 70(e)(2) by a bankruptcy

trustee to a similar situation. That was the case of *In re Espelund*, Bankruptcy No. 44906 in such court, in which the following is cited from the Judge's opinion dated June 30th, 1959:

> "The question then is whether Congress intended, by virtue of the 1952 Amendment (70(e)(2)) to make said sub-division effective with respect to exempt property . . ."
>
> "Nothing in said report indicates an intent on the part of Congress to give meaning to Section 70(e)(2) by virtue of the Amendment which would expand the rights of creditors through the trustee to the exempt property of the bankrupt."
>
> "If in the case at bar, the property had not been exempt, title would have passed to the trustee . . . If, in addition however, there had been a junior encumbrancer whose lien was not voidable as to the trustee, there would be occasion for the preservation.
>
> "Providing for such preservation is all that the 1952 Amendment to 70(e)(2) appears to do. To hold that this Amendment has the sudden and drastic effect of bringing exempt property into the operation of the Act does too much violence to the balance of Section 70 which must be read as a whole, as well as Section 6 of the Bankruptcy Act.
>
> "It is therefore my opinion that the order of the referee under date of December 2nd, 1958, so far as it voids the lien of petitioner, Pacific Finance Company, obtained by a chattel mortgage dated April 28th, 1958, upon household goods belonging to the bankrupt as to the trustee, and preserves it for the benefit of the estate, is invalid and must be reversed."

It must be apparent that the order in this case is very similar to the one reversed by Judge Lindberg. If we were to allow the trustee to carry out the terms of the order entered below in this case, it would force the Baldwins, as a condition to retaining their exempt property, to pay to the trustee after acquired funds, money not subject to bankruptcy. The *Lockwood* and *Morris* cases cannot be so lightly and easily ignored. The protection given exemptions by the Bankruptcy Act cannot be so readily flaunted. The bankrupt is entitled to his exemptions. The trustee is not. Appellant resubmits that the order appealed from should be reversed.

Respectfully submitted,

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